



United States Government
NATIONAL LABOR RELATIONS BOARD
Resident Office - Region 5
1099 14th Street, NW - Suite 5530
Washington, DC 20570-0001

January 17, 2001

*Exemption
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VIA FACSIMILE TRANSMISSION (516) 364-0466 AND FIRST CLASS MAIL

Mr. Mark L. Sussman, Esq.
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1000 Woodbury Road, Suite 402
Woodbury, New York 11797

American Institute of Physics
Cases 5-CA-29366

Dear Mr. Sussman:

The Region has received your December 6, 2000 letter of representation in this matter. The Region has reviewed evidence provided by the Charging Party. I set forth below allegations that warrant further investigation and the evidence that I need from the Employer to complete the investigation in this matter.

The original 8(a)(1) charge was filed by Charging Party, Jeff Schmidt, on November 28, 2000 and served [REDACTED] on the Employer on November 28, 2000. It alleges that on May 31, 2000, the Employer, by its officers, agents, and supervisors, discharged Mr. Schmidt in retaliation for protected, concerted activity.

The first amended charge was filed by Mr. Schmidt on January 3, 2001. It alleges that on May 31, 2000, the Employer, by its officers, agents, and supervisors, discharged Mr. Schmidt in retaliation for protected, concerted activity and because he advocated formation of a union at the workplace in violation of Section 8(a)(3) and (1) of the Act. It further alleges that on August 29, 2000 the Employer promulgated a rule prohibiting employees from discussing their performance appraisals in violation of Section 8(a)(1).

As a result of the investigation of Charging Party's evidence, it is alleged as follows. Since March 1981, [REDACTED] was employed as a physics [REDACTED] with Physics Today (PT) magazine, a Division of the American Institute of Physics (AIP). [REDACTED] was [REDACTED] on May 31, 2000. At the time of [REDACTED] immediate supervisor was [REDACTED] of Physics Today magazine. [REDACTED] boss is [REDACTED] [REDACTED] of Physics Today. [REDACTED] predecessor, [REDACTED] was [REDACTED] about March 2, 1999.) [REDACTED] boss is [REDACTED] [REDACTED] for AIP. [REDACTED]

boss is [REDACTED] of the American Institute of Physics. The American Institute of Physics has approximately 500 employees. [REDACTED] at AIP.

On May 31, 2000, [REDACTED] told [REDACTED] that [REDACTED] wanted to meet with them. Thereafter, [REDACTED] escorted [REDACTED] to the personnel office. [REDACTED] joined them in a small conference room. [REDACTED] said, we see in [REDACTED] introduction to [REDACTED] book that [REDACTED] have stolen from the magazine. Therefore, [REDACTED] can [REDACTED] by Physics Today. [REDACTED] said [REDACTED] employment is [REDACTED] now. [REDACTED] objected and denied the accusation. [REDACTED] said, we are not here to answer questions. [REDACTED] said we are not going to talk about this today. [REDACTED] said that [REDACTED] would not be allowed to go back to [REDACTED] office and would not be allowed to come back into the building at any time for any reason. Thereafter, [REDACTED] was escorted from the building. [REDACTED] alleges that [REDACTED] use of office time was consistent with what management allows and with the office culture that management maintains. [REDACTED] claims that [REDACTED] was not paid for certain vacation time, personal days and bonus days.

[REDACTED] tells the Region that [REDACTED] would not have been [REDACTED] had [REDACTED] not engaged in workplace activism with co-workers to improve terms and conditions of employment and had [REDACTED] not advocated formation of a union at the workplace. To support this claim, [REDACTED] alleges the following.

On November 15, 1996, [REDACTED] and co-workers gave PT's [REDACTED] a ten-point list of changes that they wanted to be made at the PT workplace. They presented their requests in the form of a proposed agenda for a two-day retreat scheduled for November 19-20, 1996. That agenda included job security, staff involvement in workplace dispute resolution, better distribution of job tasks, a change in hiring practices to increase diversity of the staff, and the provision of appropriate conditions of employment for professionals.

On September 18, 1997, a majority of the PT staff, led by [REDACTED] gave [REDACTED] a list of concerns to improve working conditions for professionals. They presented their concerns as a request for agenda time at a one-day retreat scheduled for September 25, 1997. On September 22, 1997, on behalf of [REDACTED] asked then PT [REDACTED] to include the support staff in the September 25, 1997 retreat. On September 25, 1997, near the beginning of the staff retreat, [REDACTED] asked if staff members could ask questions. [REDACTED] shouted no, that's an order. A few days after the retreat, [REDACTED] told [REDACTED] that [REDACTED] thought that [REDACTED] request for the right to ask questions was a disguised attempt to raise issues of staff concern.

On October 1, 1997, [REDACTED] gave [REDACTED] a written "gag order." [REDACTED] told [REDACTED] that [REDACTED] "interruption" at the retreat was "destructive and counterproductive" and that continuation of such behavior in the office or at any work-related activity will not be tolerated. The notice stated that it was to be treated as confidential, i.e., that [REDACTED] could not discuss it with co-workers. Shortly thereafter, [REDACTED] was given a similar gag order and warned about speaking up during staff meetings. On October 17,

1997, [REDACTED] and co-workers, in a written grievance presented to the PT [REDACTED] at its annual meeting, requested relief from what they perceived as an increasingly repressive work environment at the magazine. The grievance describes how [REDACTED] had been warned about speaking up regarding workplace problems. The grievance states, "Both [REDACTED] have been outspoken about problems that many of us see at the magazine. We feel that the [gag orders on them] contribute to a repressive atmosphere at the magazine and restrict all of us. We hope the [REDACTED] will do whatever it can to get these warnings retracted, and to remind the PT [REDACTED] that repression is counterproductive. Such steps would go along way toward diminishing the fear that [REDACTED] now associate with trying to openly address problems at the magazine." In addition to this written presentation, [REDACTED] and co-workers also orally presented collective grievances to the [REDACTED] during private individual meetings. On December 2, 1997, [REDACTED] rescinded the gag orders on [REDACTED]

On January 22, 1998, [REDACTED] asked [REDACTED] not to reduce support-staff help as had been discussed at prior staff meetings. [REDACTED] indicated that [REDACTED] was not inclined to give the request much consideration because of [REDACTED] workplace activity.

On January 28, 1998, after working hours, [REDACTED] broke up two private conversations between [REDACTED] and a co-worker. After breaking up the second conversation, [REDACTED] told them that [REDACTED] was forbidding all private conversations between [REDACTED] at work because of the workplace activity that had taken place during the last year. Shortly after January 28, 1998, [REDACTED] told an employee that [REDACTED] was 100 percent sure that the activity that [REDACTED] had broken up between [REDACTED] and a co-worker involved [REDACTED] organizing against management's effort to shift clerical work from the secretarial staff to the editors.

On March 20, 1998, [REDACTED] told [REDACTED] that some of [REDACTED] workplace activities were counterproductive.

On March 24, 1998, [REDACTED] met with [REDACTED] to discuss [REDACTED] 1998 performance review. During this review, [REDACTED] condemned [REDACTED] workplace activities with co-workers and focused in particular on Schmidt's leading role at the November 1996 retreat, where [REDACTED] had proposed an agenda to address job security and working conditions.

[REDACTED] In addition, [REDACTED] increased [REDACTED] workload from 14 feature articles per year to 18 feature articles per year, a 28 percent increase.

On April 27, 1998, [REDACTED] wrote [REDACTED] 1998 performance review. [REDACTED] circulated [REDACTED] appeal to co-workers. That [REDACTED] details management's hostility toward concerted activity in the workplace. On June 25, 1998, [REDACTED] met with [REDACTED] concerning [REDACTED] 1998 performance review. [REDACTED] made it clear to [REDACTED] that [REDACTED] workplace activism, apart from [REDACTED] job assignments, played a central role in [REDACTED] performance review and [REDACTED] job performance rating.

From mid-December 1998 to mid-June 1999, [REDACTED] took a six-month unpaid leave of absence. Upon [REDACTED] return from unpaid leave in mid-June 1999, [REDACTED] criticized [REDACTED] for circulating [REDACTED] 1998 performance review [REDACTED] among co-workers.

On August 17, 1999, [REDACTED] received a 1999 performance review covering the period from February 1998 to August 1999. The review states, *inter alia*, "During this review period, [REDACTED]

[REDACTED] of Physics Today. [REDACTED] An example of such behavior, according to the review, was showing co-workers [REDACTED] 1998 performance review [REDACTED] Schmidt alleges that the 1999 performance review [REDACTED] for communication with co-workers about workplace issues.

In mid-August 1999, [REDACTED] held discussions with a number of co-workers to organize support for the right of employees to discuss performance reviews and other workplace issues with each other and to discuss [REDACTED] actions by management against employees. On August 19, 1999, [REDACTED] met with [REDACTED] to discuss [REDACTED] 1999 performance review. [REDACTED] communications with co-workers concerning workplace issues. [REDACTED] demanded that [REDACTED] tell [REDACTED] which co-workers [REDACTED] had spoken with about issues raised in [REDACTED] 1999 performance review.

On August 26, 1999, [REDACTED] informed [REDACTED] that [REDACTED] and [REDACTED] had decided not to reveal any names or any information that would identify which [REDACTED] were involved in private discussions about workplace issues. During this conversation, [REDACTED] reiterated [REDACTED] opposition to private conversations between [REDACTED] about workplace issues. [REDACTED] told [REDACTED] that everything to do with the job was [REDACTED] domain and that nothing should be kept from [REDACTED]

On November 10, 1999, [REDACTED] requested that [REDACTED] excess vacation time be carried over to 2000. [REDACTED] request was denied, with minor exception. [REDACTED] identical request was granted.

During the week of May 22, 2000, an article about [REDACTED] book that had been written in *The Chronicle of Higher Education* was circulating in the workplace. The article says, among other things, that [REDACTED] advocated that salaried professionals form unions in their workplaces.

On May 30, 2000, [REDACTED] distributed a positive review of [REDACTED] book to all Physics Today [REDACTED] As noted, on May 31, 2000, [REDACTED]

On August 29, 2000, [REDACTED] called a special staff meeting and told [REDACTED] not to discuss their performance reviews with anyone.

In light of the foregoing, by close of business Thursday, January 31, 2001, at a time and location that is mutually convenient, I would like to take sworn affidavits from

[REDACTED] and from any other witnesses that you believe has evidence relevant to the investigation of the above-captioned matters. Please be advised if AIP refuses to allow me to take sworn affidavits from said witnesses, such refusal will be considered to constitute less than full and complete cooperation with Region 5's investigation of these matters. Be advised that the submission of position statements or memoranda, or the submission of affidavits that have not been taken by a Board agent, does not constitute full and complete cooperation with the Region's investigation.

In addition to the presentation of witnesses mentioned above, please submit to by close of business on **Thursday, January 31, 2001** any other evidence that your client wishes to provide in this matter. Absent submission of Employer evidence by that date, I will make my recommendation to the Regional Director based solely on the evidence contained in the file.

Please contact me if you have any questions. My telephone-number is [REDACTED] and my facsimile number is [REDACTED]

Very truly yours,

Thomas P. McCarthy

Thomas P. McCarthy
Field Attorney